Office-Supreme Court, U.S.
FILED
JAN 5 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 502

WISCONSIN BANKERS ASSOCIATION,
a Wisconsin corporation, and
THE AMERICAN EXCHANGE BANK,
a Wisconsin banking corporation, and
COMMERCIAL STATE BANK,
a Wisconsin banking corporation, and
GRAFTON STATE BANK,
a Wisconsin banking corporation, and
THE BANK OF COMMERCE,
a Wisconsin banking corporation, and
KENOSHA NATIONAL BANK,
a National banking association organized and existing under the laws of the United States of America,

Plaintiffs-Petitioners,

vs.

ALBERT J. ROBERTSON, IRA DIXON, and WILLIAM J. HALLAHAN, comprising the FEDERAL HOME LOAN BANK BOARD, Washington, D. C.,

Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITION FOR REHEARING

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PETITION FOR REHEARING

This Petition for Rehearing of the Order denying the Writ of Certiorari is filed in accordance with Rule 58(2) on ground that there are intervening circumstances of

substantial and controlling effect. These circumstances were not available to petitioners at time the original Petition for a Writ of Certiorari was filed. The full import thereof was learned by petitioners only after a Reply Brief had been filed with this Court by the petitioners, and after this Court granted certiorari in *Harry Clifford Porter v. Aetna Casualty & Surety Company*, No. 549 Misc. on December 11, 1961.

More particularly, the intervening circumstances consist of the perpetration of a deception upon this Court by the Solicitor General of the United States, whether deception was intended or otherwise. The deception consists of the Solicitor General taking two diametrically opposed positions as to an identical legal conclusion without so admitting to this Court.

Petitioners urge that without so intending the judgment in the Lower Court if allowed to stand will continue to contribute toward such deceptive result. Only through review by this Court can there be an affirmative determination as to whether said judgment is in fact entitled to respect and adherence by the United States, its agencies and counsel. Petitioners refuse to believe that there is the alternative that the United States may consider a judgment of a United States Court of Appeals to be scrupulously observed (and relied upon) by one executive department, but to be completely ignored as non-existent by another executive department. Even less acceptable to petitioners is the condition where the Solicitor General of the United States has filed a brief with this Court opposing the Petition for review of a judgment which this same Solicitor General has treated as non-existent in a brief (amicus curiae) filed with this Court in the other case pending for review. It is fantastic to believe that the Solicitor General should convince this Court by any

processes of this type. (Incidentally, the other petition for review has been granted by this Court.)

In the instant case petitioners contend that regulations and charter provisions promulgated and maintained since 1949 by the Federal Home Loan Bank Board for Federal Savings and Loan operation are contrary to the law enacted by Congress. Specifically, petitioners urge that the challenged regulations provide capital raising through a deposit accepting procedure instead of observing the statutory requirement that savings and loans raise capital only by sale of shares.

The United States Court of Appeals for the District of Columbia decided that the challenged regulations were valid and in accordance with the law in providing for savings and loans raising capital by accepting payments on shares. The Appeals Court determined that savings and loans were not accepting deposits. Commenting upon the challenged regulations the Appeals Court stated:

> "* * * It seems quite clear, therefore, that the words 'savings accounts' in the regulation defining 'capital' have the same meaning as the word 'shares' in the statutory provision governing the raising of capital."

The Solicitor General of the United States opposes review of the Appeals Court judgment. This can only mean that the Solicitor General not only believes but insists that a Federal savings and loan investment is a share in capital. Yet this same Solicitor General in a brief amicus curiae filed with this Court in the case of *Harry Clifford Porter v. Aetna Casualty & Surety Company*, No. 549 Misc., as to which certiorari was granted on December 11, 1961 by this Court, stated on behalf of the United States:

> "* * * We are advised by the Veterans Administration that, as of June 30, 1961, these beneficiaries had

> estates in excess of $750,169,000, nearly all of which was derived from veterans benefits. A substantial portion of these estates, as the present case would indicate, consists of funds on deposit in interest-bearing accounts in banks, trust companies, savings bank, building and loan associations and savings and loan associations. These interest-bearing accounts are not exclusively for purposes of investment, as the Court of Appeals has held, but also for the purpose of safekeeping and ready availability for rehabilitation, clothing, and medical emergencies. * * *"

In the quoted language the United States admits, if not insists, that investments in "building and loan associations and savings and loan associations" are "funds on deposit in interest-bearing accounts". This is precisely the contention of petitioners in the instant case in challenging the legality of savings and loan regulations and charter provisions promulgated and maintained since 1949 by the Federal Home Loan Bank Board.

The position of the United States as set forth in the language quoted is completely opposed to the Judgment of the Circuit Court of Appeals for the District of Columbia Circuit as to which petitioners seek review by grant of certiorari. The Appeals Court judgment determined that under the challenged regulations "savings accounts" were "shares" in savings and loan associations.

All conclusions as to clarity of the regulations made by the Appeals Court to the contrary notwithstanding, the Solicitor General of the United States has opposed the grant of certiorari in the instant case while at the same time urging upon this Court in the *Porter v. Aetna Casu-*

alty case that "savings accounts" in savings and loan associations are:

> "funds on deposit in interest-bearing accounts"
>
> or
>
> "These interest-bearing accounts (that) are not exclusively for purpose of investment."

By what stretch of imagination can "funds on deposit in interest-bearing accounts" or funds described as "interest-bearing accounts — not exclusively for purpose of investment" meet the capital raising prescriptions for savings and loans so clearly set forth in the law enacted by Congress:

> "Capital; deposits; certificates of indebtedness
>
> "(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board."
>
> (Home Owners' Loan Act of 1933, Section 5(b), 48 Stat. 132, U.S.C., Title 12, Section 1464(b)).

It is untenable that Federal administrative officers that are members of the Executive Department of the Government should so ignore both the law and the judgment of a Court of Appeals. Certainly, the Solicitor General should not place himself in the position of urging that a savings and loan investment is a "share" in the instant case, and then insist that the same investment is also a "fund on deposit in interest-bearing accounts", in the *Porter v. Aetna Casualty & Surety Company* case. A savings and loan investment is one or the other, but certainly it is not both.

Petitioners respectfully suggest to this Court that the judgment of the Court of Appeals for the District of Columbia should be reviewed by this Court granting the Petition for a Writ of Certiorari. Any judgment of an Appeals Court that has been subject to the treatment described herein by officers of the United States should be reviewed by this Court. Only by this Court promulgating its opinion in the instant case can there be a conclusive answer as to the validity of the challenged regulations.

CONCLUSION

Petitioners again urge upon this Court the need for reviewing the challenged regulations and charter provisions by a hearing of this case. Only a review by this Court can permit determining whether a savings and loan account, deposit, share, or whatever it may be called, actually reflects the capital raising procedure required under the law provided by Congress. Petitioners respectfully request this Court to grant the Petition for Rehearing, and to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

HARVEY W. PETERS
1308 North Prospect Avenue
Milwaukee 2, Wisconsin
Counsel for Plaintiffs-Petitioners

DATE: January 4, 1962.

CERTIFICATE OF COUNSEL

I, Harvey W. Peters, an attorney for the above-named plaintiffs-petitioners, Wisconsin Bankers Association, The American Exchange Bank, Commercial State Bank, Grafton State Bank, The Bank of Commerce, and Kenosha National Bank, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and the Petition is restricted to the grounds of the intervening circumstances presented in the Petition.

HARVEY W. PETERS
Counsel for Plaintiffs-Petitioners
Wisconsin Bankers Association
The American Exchange Bank
Commercial State Bank
Grafton State Bank
The Bank of Commerce
Kenosha National Bank